# United States Department of Labor
# Employees' Compensation Appeals Board

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| **M.J., Appellant** | ) | |
| **and** | ) | **Docket No. 20-1263** |
| | ) | **Issued: September 14, 2021** |
| **U.S. POSTAL SERVICE, POST OFFICE, Berkeley Heights, NJ, Employer** | ) | |

*Appearances:*
*Thomas R. Uliase, Esq.*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On June 8, 2020 appellant, through counsel, filed a timely appeal from a February 7, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id*. An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id*.; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq*.

## ***ISSUE***

The issue is whether appellant has met his burden of proof to modify OWCP's March 18, 2016 loss of wage-earning capacity (LWEC) determination.

## ***FACTUAL HISTORY***

This case has previously been before the Board on a different issue.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On September 17, 2007 appellant, then a 43-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained left ankle and knee, right knee, and low back injuries on that date when he stepped in a hole and fell in the performance of duty. He initially did not stop work.

OWCP accepted the claim for lumbosacral spondylosis without myelopathy, right knee sprain, sprain of the right knee medial collateral ligament, right knee tear of the medial meniscus, and right ankle sprain.[4] On March 7, 2008 appellant underwent a partial medial meniscectomy of the right knee. He received wage-loss compensation on the supplemental rolls as of March 31, 2008, and on the periodic compensation rolls commencing August 3, 2008.

In a report dated August 27, 2014, Dr. Scott Naftulin, an osteopath Board-certified in physical medicine and rehabilitation, noted appellant's diagnoses of multilevel lumbar degenerative disc disease/internal disc disruption, right knee osteoarthritis -- post meniscal repair, and right L5-S1 radicular pain. On that same day he completed a work capacity evaluation form (OWCP-5c) in which he related that appellant could return to work for four hours a day. Dr. Naftulin noted that appellant could only tolerate sitting, standing, or walking for 15 minutes at a time and therefore required a position in which he could move about freely as required. He also noted that appellant could twist, bend, stoop, squat, kneel, climb for up to one hour each day, and that appellant could operate a motor vehicle for up to two hours a day.

In a report dated February 5, 2015, a vocational rehabilitation counselor noted that he had reviewed Dr. Naftulin's August 27, 2014 report which related that appellant could only return to work for four hours a day. He explained that he had notified the employing establishment regarding appellant's restrictions and had received notice that the proposed position could only be performed for eight hours a day. The counselor related that he had forwarded the eight-hour-a-day position description to Dr. Naftulin, who thereafter related that appellant could perform the position on a trial basis for eight hours a day.

[3] Docket No. 10-0554 (issued November 3, 2010).

[4] The record reflects that appellant has a history of back symptoms, episodic over many years, and he had sustained a back injury due to a motor vehicle accident over 20 years prior.

In a May 6, 2015 report, Dr. Naftulin related that he had initially suggested that appellant return to work for four hours a day, but that he had also signed off on a position description for work eight hours a day, stating that it was "trial only."

On December 14, 2015 OWCP offered appellant a position as a customer care agent, for eight hours a day. The duties required that appellant lift up to 10 pounds; squat, kneel, climb, twist, bend, and stoop for one hour per day; and be able to alternate sitting and standing. The physical requirements included sitting in an office chair with a supportive back or standing at a workstation, as needed for comfort, regular simple grasping of a mouse, regular pushing, pulling, using a computer mouse, interchangeable to right/left side as needed for comfort, and regular fine manipulation or use of single finger when using a key board. The workstation was noted to be ergonomically adjustable, and the employee could work at his own speed.

On January 11, 2016 appellant accepted the position as a customer care agent which accommodated his work restrictions.

By decision dated March 18, 2016, OWCP found that the actual wages of the customer care position fairly and reasonably represented his wage-earning capacity. It noted that, "Your actual earnings meet or exceed the current wages of the job held when injured." OWCP explained that appellant was reemployed with no loss in earning capacity and it terminated wage-loss compensation payments as of the date of reemployment, according to the provisions of 5 U.S.C. § 8106 and 8115.

On April 16, 2019 appellant filed a notice of recurrence (Form CA-2a), alleging a recurrence of disability as of February 2, 2019 due to worsening of his accepted work-related conditions.

OWCP also received Form CA-7 claims for wage-loss compensation dated from April 8 to June 7, 2019.

In a development letter dated May 14, 2019, OWCP advised appellant of the deficiencies in his claim and explained the need to submit additional medical evidence to substantiate a material worsening of his accepted conditions. It afforded him 30 days to provide evidence substantiating any of the criteria.

In a March 25, 2019 report, Dr. Naftulin noted that appellant "describes progressively disabling symptoms that started about 6 months ago." He noted that appellant was having "increasing difficulty working due to his symptoms." Dr. Naftulin noted that appellant reported having imaging studies, abdominal causes were ruled out, it was suggested to be a musculoskeletal problem, however, treatment had been difficult due to lack of transportation. He examined appellant and found that appellant did not appear to be in acute distress, had normal gait and station, and could heel and toe walk without weakness. Dr. Naftulin found painful limitations with lumbosacral flexion and extension, tenderness in the right thoracic and lumbar paraspinals, strength, reflex, and sensory testing without focal deficit, skin without rashes, and intact peripheral pulses, which appeared neurologically stable and without evidence of infection. He diagnosed low back pain, other intervertebral disc displacement, lumbosacral region, and muscle spasm of back.

Dr. Naftulin also completed a form indicating that appellant was disabled for work from March 18 to 29, 2019.

In a March 29, 2019 report, Dr. Naftulin noted that appellant's chief complaint was mid to low back pain. He examined appellant and assessed low back pain, recommended dietary counseling and surveillance, exercise counseling, and chiropractic treatment, and advised that appellant remain off work for the next two weeks.

OWCP received an April 6, 2019 magnetic resonance imaging (MRI) scan of the lumbar spine. The scan related findings of no significant central canal stenosis throughout the lumbar region, mild right foraminal stenosis at L5-S1, mild broad-based central disc protrusion at L5-S1, significant facet arthropathy diffusely, most prominent at L4-5 and L5-S1.

In an April 12, 2019 report, Dr. Naftulin noted that appellant complained primarily of right lower back pain that radiated into the mid thoracic spine and around the flank and occasionally into the back of the right leg. He also noted that appellant related that he was unable to tolerate prolonged periods of sitting or standing and was disabled from work since symptom onset. Dr. Naftulin advised that appellant recently underwent an MRI scan of the lumbar spine without evidence of acute disc herniation or stenosis and a remote lumbar provocation discography was consistent with L4-5 discogenic pain. He assessed other vertebral disc displacement, lumbosacral region, and indicated that appellant remained disabled from work.

In a May 24, 2019 report, Dr. Naftulin noted that appellant continued to have disabling right mid and lower back pain radiating to the right posterior thigh. He also noted that appellant described a limited sitting, standing, and walking tolerance of 10 to 15 minutes at a time, and that appellant's job primarily involved sitting for 8 hours a day which appellant felt incapable of performing. Dr. Naftulin noted that appellant was seeing a chiropractor and walking for exercise, and that he reported persistent right knee pain "which he feels has worsened again recently." He noted appellant's physical examination findings included tenderness throughout the mid-thoracic and lumbar paraspinals, severe limitations in lumbosacral flexion and extension, otherwise neurologically stable. Dr. Naftulin diagnosed other intervertebral disc displacement, lumbosacral region, low back pain, and muscle spasm of back, and recommended that appellant remain off work.

By decision dated July 19, 2019, OWCP denied modification of the LWEC determination. It found that the medical evidence did not establish a worsening of the accepted conditions, and that it had not received evidence that the March 18, 2016 decision was in error, or that appellant was vocationally rehabilitated.

OWCP subsequently received additional evidence. In a July 2, 2019 report, Dr. Phillip F. Acevedo, a physiatrist, diagnosed other intervertebral disc displacement, lumbosacral region, and low back pain. He performed a right L5 transforaminal epidural.

OWCP received chiropractic reports dating from April 25 to May 6, 2019, from Dr. Glenn Clearie.[5]

In reports dated July 24 and August 7, 2019, Dr. Naftulin repeated his prior stated findings and opinion that appellant remained disabled from work.

On August 9, 2019 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on December 3, 2019. Appellant discussed the modified position he accepted on January 11, 2016, and indicated that as time progressed, his condition slowly worsened, and that eventually he had to ask his supervisor for permission to lie down on the floor in the conference room during his one-hour lunch break to try to get his back spasms to stop. He also indicated that during his 1 hour and 15-minute commute to work, his coworker had to pull over to let him out to stand for a minute. Appellant confirmed that there was no changes in the job with the exception of working overtime in December, that he had no injuries, and that his activities outside work were minimal. Counsel for appellant argued that appellant's muscle spasms were a material change. He also indicated that he would obtain additional medical evidence from Dr. Naftulin. No additional medical evidence was submitted after the hearing.

By decision dated February 7, 2020, an OWCP hearing representative affirmed the July 19, 2019 decision, finding that the evidence of record was insufficient to establish a change in the customer care representative position, a material worsening of appellant's work-related conditions, that the March 18, 2016 LWEC determination was issued in error, or that appellant was vocationally rehabilitated.

## ***LEGAL PRECEDENT***

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.[6] Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[7] A determination regarding whether actual earnings fairly and reasonably represent one's wage-earning capacity should be made only after an employee has worked in a given position for at least 60 days.[8] Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.[9]

[5] No subluxation on x-ray was noted.

[6] 5 U.S.C. § 8115(a); *see K.B.*, Docket No. 20-0358 (issued December 10, 2020); *O.S.*, Docket No. 19-1149 (issued February 21, 2020); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[7] *See J.A.*, Docket No. 18-1586 (issued April 9, 2019).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

[9] *See M.F.*, Docket No. 18-0323 (issued June 25, 2019).

OWCP's procedures provide guidelines for determining wage-earning capacity based on actual earnings. Reemployment may not be considered representative of the injured employee's wage-earning capacity when an injured employee who has been released to full-time work is working less than full-time hours, the job is temporary where the employee's job when injured was permanent, and the job represents permanent seasonal employment in an area where year-round employment is available (unless the employee was a career seasonal or temporary employee when injured).[10] In addition, it is well established that a position that is considered an odd-lot or makeshift position designed for a claimant's particular needs is not appropriate for a wage-earning capacity determination.[11]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[12] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[13]

## ***ANALYSIS***

The Board finds that appellant has not met his burden of proof to modify OWCP's March 18, 2016 LWEC determination.

Appellant has not submitted any evidence or argument to establish that OWCP's March 18, 2016 LWEC determination was erroneous. Appellant has not argued that the customer care position was a part-time, temporary, seasonal, or odd-lot or makeshift position. The record reflects that the position was within appellant's work restrictions and he worked in the position for more than 60 days prior to the issuance of the March 18, 2016 LWEC determination.[14] For these reasons, the Board finds that appellant has not established that OWCP's March 18, 2016 LWEC determination, based on his actual earnings, was erroneous.

Since OWCP found that appellant could perform the duties of a customer care representative, the issue is whether there has been a material change in his work-related condition that would render him unable to perform those prescribed duties.[15] This is primarily a medical

[10] *Supra* note 8.

[11] *See A.J.*, Docket No. 10-0619 (issued June 29, 2010).

[12] *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3a (June 2013).

[13] *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

[14] *Supra* note 8; *see M.S.*, Docket No. 19-0692 (issued November 18, 2019); *James D. Champlain*, 44 ECAB 438, 440-41 (1993).

[15] *D.Q.*, Docket No. 17-1220 (issued May 18, 2018); *Phillip S. Deering*, 47 ECAB 692 (1996).

question.[16] In reviewing the medical evidence of record, the Board finds that appellant has failed to provide sufficient evidence to establish that a modification of the March 18, 2016 LWEC determination is warranted based on a worsening of his injury-related condition.

OWCP accepted the claim for lumbosacral spondylosis without myelopathy, right knee sprain, sprain of the right knee medial collateral ligament, right knee tear of the medial meniscus, and right ankle sprain. With respect to whether modification of OWCP's March 18, 2016 LWEC determination was warranted, the Board finds that appellant's treating physicians did not provide probative opinion that these employment-related medical conditions had materially worsened or that appellant could no longer perform the duties of the position.

Dr. Naftulin provided reports dated March 25 to August 7, 2019. In a March 25, 2019 report, he noted that appellant "describes progressively disabling symptoms that started about 6 months ago" and that appellant was having "increasing difficulty working due to his symptoms." Dr. Naftulin examined appellant and found that appellant did not appear to be in acute distress, had normal gait and station, and could heel and toe walk without weakness. He diagnosed low back pain, other intervertebral disc displacement, lumbosacral region, and muscle spasm of back, and provided appellant a note indicating that appellant was disabled from work. Dr. Naftulin saw appellant on March 29, 2019, and recommended chiropractic treatment and that appellant remain off work for the next two weeks. In an April 12, 2019 report, he assessed other vertebral disc displacement, lumbosacral region, and advised that appellant remained disabled from work. In a May 24, 2019 report, Dr. Naftulin indicated that appellant continued to have disabling right mid and lower back pain radiating to the right posterior thigh, that appellant described limited sitting, standing and walking tolerance of 10 to 15 minutes at a time, and that appellant's job primarily involved sitting 8 hours a day which appellant felt incapable of performing. He continued to advise that appellant remained disabled from work. Dr. Naftulin, repeated his findings and opinions in his July 24 and August 7, 2019 reports. OWCP also received a July 2, 2019 report from Dr. Acevedo who diagnosed other intervertebral disc displacement, lumbosacral region, and low back pain.

The Board finds that the reports from Dr. Naftulin and Dr. Acevedo are of limited probative value as the physicians did not offer a rationalized opinion, based upon objective medical evidence, that appellant was unable to perform the customer care position on which the March 18, 2016 LWEC decision was based. Dr. Naftulin noted that appellant felt incapable of performing the work; however, neither Dr. Naftulin nor Dr. Acevedo provided a rationalized medical opinion explaining why appellant was unable to perform the customer care position, due to the accepted conditions. They also failed to provide any opinion that appellant's employment-related medical conditions had materially worsened. As neither Dr. Naftulin nor Dr. Acevedo explained why appellant's accepted medical conditions after February 2, 2019 had worsened such that he could not perform the duties of the customer care position, these reports are insufficient to warrant modification of the March 18, 2016 LWEC determination.[17]

[16] *M.G.*, Docket No. 19-1659 (issued August 18, 2020); *R.S.*, Docket No. 15-1229 (issued October 2, 2015).

[17] *See D.T.*, Docket No. 18-0174 (issued August 23, 2019).

The record also contains chiropractic notes dating from April 25 to May 6, 2019. However, a chiropractor is only considered a physician for purposes of FECA if he or she diagnoses subluxation based upon x-ray evidence.[18] As the chiropractor did not diagnose a spinal subluxation based upon x-ray evidence, these reports do not constitute competent medical evidence.[19]

The record also contains an April 6, 2019 MRI scan of the lumbar spine. The Board has long held that diagnostic studies, standing alone, lack probative value on the issue of causal relationship as they do not address whether the accepted employment injury caused the diagnosed conditions.[20]

During the hearing, appellant noted that his co-worker had to pull over to allow him to stand for a minute during his work commute. If a claimant's accepted condition worsens such that he can no longer commute to work, this would constitute a recurrence of disability; however, if the commute itself caused an increase in disability, this would not be compensable as driving to and from work is not a work factor under FECA.[21] The Board has explained that to be of probative value the medical evidence of record must explain whether a claimant is disabled and unable to commute, or disabled due to the commute.[22] Appellant did not submit any medical evidence in relation to the commute, and therefore the hearing testimony lacks probative value.

The Board also finds that there is no evidence of record to show that appellant has been retrained or otherwise vocationally rehabilitated such that modification of OWCP's March 18, 2016 LWEC determination is warranted.[23]

For these reasons, the Board finds that appellant has not met his burden of proof to modify OWCP's March 18, 2016 LWEC determination.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

## ***CONCLUSION***

The Board finds that appellant has not met his burden of proof to modify OWCP's March 18, 2016 LWEC determination.

[18] Section 8101(2) of FECA provides that the term physician includes chiropractors only if the treatment consists of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2). *See T.T.*, Docket No. 18-0838 (issued September 19, 2019); *Thomas W. Stevens*, 50 ECAB 288 (1999); *George E. Williams*, 44 ECAB 530 (1993).

[19] *C.S.*, Docket No. 19-1279 (issued December 30, 2019).

[20] *J.P.*, Docket No. 19-0216 (issued December 13, 2019); *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

[21] *See R.L.*, Docket No. 15-1337 (issued January 27, 2016); *K.E.*, Docket No. 13-0296 (issued June 6, 2013).

[22] *See generally Betty S. Thompson*, Docket No. 01-2039 (issued July 2, 2002).

[23] *See A.J.*, *supra* note 11.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the February 7, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 14, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board